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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1176

UNION PACIFIC RAILROAD COMPANY, A CORPORATION

Petitioner.

vs.

CHARLOTTE E. LEET, ADMINISTRATRIX OF THE ESTATE OF HAROLD PATRICK UTTERBACK, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
Counsel for Petitioner.
THOMAS W. BOCKES,
Of Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Union Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of the State of California in the above entitled cause.

Petitioner respectfully shows:

A. Jurisdiction

(a) The statutory provision sustaining the jurisdiction of this Court in this cause is Section 237(b) of the

Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, United States Code, Title 28, Section 344(b), the federal question involved being the interpretation of the venue provision of the Federal Empoyers' Liability Act, 45 U. S. Code, Sec. 56.

(b) The date of entry of the judgment of the Supreme Court of California here sought to be reviewed is January 25, 1945. Said judgment is the final judgment of that Court, which is the highest court in the State of California in which a decision of said matter could be had. This petition for writ of certiorari, supporting brief, and the record in said cause are being filed in this court within three months after the entry of said final judgment.

B. Statutes Involved

This case arises under the Federal Employers' Liability Act (United States Code, Title 45, Sections 51-59).

C. Question Presented

The question presented is whether the Supreme Court of California erred in deciding that the courts of that state have been deprived by the venue provisions of the Federal Employers' Liability Act of all power to decline jurisdiction of a case brought under the Federal Employers' Liability Act by a resident of Oregon against a Utah railroad corporation doing business in California, where the accident involved occurred in Oregon, decedent and his heirs resided in Oregon, all the witnesses resided in Oregon, and none of the witnesses could be brought to testify personally at the trial in California without serious interference with interstate commerce.

D. Summary Statement of the Matter Involved

Harold Patrick Utterback, while employed as a fireman on one of petitioner's freight trains was killed in an acci-

dent which occurred near Portland in Multnomah County, Oregon, on February 7, 1942. All witnesses to the accident, which involved two trains, resided in or near Portland. Mr. Utterback and his widow and children, for whose benefit the action was instituted, also resided in Portland.

Union Pacific Railroad Company, petitioner, is a corporation of the State of Utah. At the time of the accident and at the present time petitioner carried on its business as a carrier of freight and passengers for hire in the States of Oregon, California, Utah and other states.

At all pertinent times there were open and functioning within the State of Oregon regularly constituted courts, both state and federal, of original and general jurisdiction, which were conveniently available for the prompt and effective enforcement of any meritorious claim against petitioner arising out of said accident. The above action was instituted April 27, 1942, in the Superior Court of the State of California in and for the County of Los Angeles. In due course petitioner filed its motion to abate the said proceedings on the ground that it could not properly defend itself in the California damage action without withdrawing from railroad service for a week or more a large number of its employees who could not be replaced by others because of labor shortages; that by direction of the government petitioner was engaged in transporting large numbers of troops and vast quantities of vital war material, the prompt movement of which was essential to the prosecution of the war; that to handle such emergency war traffic and other traffic, petitioner was compelled to work all of its train service employees, most of them overtime, and some of them on double shifts; that the withdrawal of one or more train crews from active service for use as witnesses in the California case would interrupt the physical operation of some of petitioner's trains; and that in these circumstances the prosecution of the case in California would require peti-

tioner either to violate its paramount obligation to the government and the public in the transportation of interstate commerce or to waive its constitutional right to present properly its defense in said case. The motion was supported by affidavits verifying all the pertinent facts. No counter-affidavits were filed.

The motion was denied on the ground that the court had no power to refuse jurisdiction in view of what the trial court felt to be the interpretation of the venue provision of the Federal Employers' Liability Act in the case of *Miles* vs. *Illinois Central R. Co.*, 315 U. S. 698.

A subsequent motion for the continuance of the trial until such time as witnesses could be brought from Oregon to Los Angeles without interfering with the transportation of interstate commerce was also denied, on the ground that since the court was bound to entertain jurisdiction of the case, it was likewise bound to try it expeditiously.

The case thereupon went to trial and evidence was introduced on the part of respondent, both by the personal testimony of witnesses and by deposition. The defendant called no witnesses, merely presenting evidence that no witnesses could be produced in person for the reasons above set forth. The jury brought in a verdict for respondent in the amount of $30,000.00.

Petitioner appealed to the District Court of Appeal of California. That court affirmed the judgment of the Superior Court.

Respondent then petitioned for a hearing of the cause by the Supreme Court of California. This was granted, thereby vacating the proceedings before the District Court of Appeal, and in due time the said Supreme Court in a four-to-three decision affirmed the judgment below, holding that the Superior Court was without power to abate the proceedings or to continue the same indefinitely, no matter what equitable considerations might exist therefor. The

Court regarded the venue provision of the Federal Employers' Liability Act as constituting a mandate by Congress that any state court having competent general jurisdiction appropriate to the purpose must entertain actions brought under the Federal Act, in spite of the existence of reasons which otherwise would require abatement of the proceedings.

Petitioner then petitioned for a rehearing, but although three of the Justices voted for it, rehearing was denied on January 25, 1945.

On proper application the Supreme Court of California entered an order staying the issuance of remittitur until further order of that court.

E. Reasons Relied On for Issuance of Writ

Petitioner submits that this court should review the said decision of the Supreme Court of the State of California for the following reason:

The California Court decided a federal question in a way probably not in accord with applicable decisions of this Court. It held that the venue provision of the Federal Employers' Liability Act is an absolute command by Congress that a state court must entertain jurisdiction of an action brought under the Act, if the carrier is doing business within that state, in spite of the existence of facts and circumstances which otherwise would require the abatement of the proceedings. That decision is probably not in accord with the decisions of this court in such cases as *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, 73 L. ed. 470; *Douglas* v. *N. Y., N. H. & H. R. Co.,* 279 U. S. 337, 73 L. ed. 747; *Miles* v. *Ill. Central R. Co.,* 315 U. S. 698 (dissenting opinion and concurring opinion of Mr. Justice Jackson); 86 L. Ed. 1129; *Herb* v. *Pitcairn,* decided Feb. 5, 1945, L. ed. Adv. Op., Vol. 89, p. 481.

Prayer

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, directed to the Supreme Court of the State of California, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case entitled on its docket, "Charlotte E. Leet, Administratrix of the Estate of Harold Patrick Utterback, Deceased, Plaintiff and Respondent, vs. Union Pacific Railroad Company, a corporation, Defendant and Appellant, Los Angeles No. 18.954", and that the court review and decide the said questions presented and reverse the judgment of the Supreme Court of the State of California entered in said cause, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Los Angeles, California, March 29, 1945.

UNION PACIFIC RAILROAD COMPANY,
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SUPREME COURT OF THE UNITED STATES
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No. 1176

UNION PACIFIC RAILROAD COMPANY,
A CORPORATION,

vs.

Petitioner,

CHARLOTTE E. LEET, ADMINISTRATRIX OF THE ESTATE OF HAROLD PATRICK UTTERBACK, DECEASED,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case and *Union Pacific Railroad Company* v. *Charlotte E. Leet, Administratrix of the Estate of Alfred Martin Thatcher, Deceased* (docketed as No. 1175 in this Court), are companion cases. The material facts in the two cases are identical, and both involve the same questions of law. They were heard together in the trial court and in the Supreme Court of California. Therefore, we are adopting by reference our brief in that case as our supporting brief in this case.

Respectfully submitted,

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EDWARD C. RENWICK,
MALCOLM DAVIS,
Counsel for Petitioner;
THOMAS W. BOCKES,
Of Counsel for Petitioner.

In the Supreme Court

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UNION PACIFIC RAILROAD COMPANY
(a corporation),
Petitioner,

vs.

CHARLOTTE B. LEET, Administratrix of the Estate of Harold Patrick Utterback, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It appears in the Advance Sheets of the California Reports at 25 Advance California Reports, 764 and appears in the Advance Sheets of Volume 155 Pacific Reporter, Second Series, page 42. It also appears in the record at page 70.

JURISDICTION.

The opinion of the Supreme Court of the State of California was rendered December 30, 1944. A petition for a rehearing was denied by the Supreme Court of California January 25, 1945. Petition for writ of certiorari was filed on April 18, 1945 and served on respondent on April 25, 1945. Jurisdiction, if present, must come from Section 237b of the Judicial Code as amended by the Act of February 13, 1925 but is not present because of the absence of any substantial federal question.

ARGUMENT.

GROUNDS FOR CERTIORARI ARE NOT PRESENT.

Utterback, a fireman employed by petitioner, was killed in a collision which occurred near Portland, Oregon on February 7, 1942. Respondent, after appointment as administratrix of the estate of Utter-

back (see *Estate of Waits*, 146 Pac. 2d 5, 23 A.C. 693), instituted an action in the Superior Court of the State of California in and for the County of Los Angeles to recover damages for the death of Utterback under the Federal Employers' Liability Act (45 U.S.C.A. 51) on April 27, 1942. Answer was filed by respondent May 28, 1942 (R. 3) and the case was then at issue and ready for trial. Four months later on September 26, 1942 (R. 14) petitioner filed a complaint in equity in the Circuit Court of the State of Oregon against Utterback's wife, son and daughter, in an attempt to enjoin the California proceeding. The action of the Oregon lower Court in granting such an injunction was reversed by the Supreme Court of Oregon (146 Pac. 2d 76—opinion on denial of rehearing 769). Petitioner herein filed a petition before this Court for certiorari in the Oregon proceeding (October Term, 1943, No. 1029) and the petition for writ of certiorari was denied by this Court on the 9th day of October, 1944. (89 L. Ed. Adv. Op. No. 1, p. 35.) Although the California proceeding was at issue and ready for trial upon the filing of petitioner's answer on May 28, 1942, on November 14, 1942 petitioner filed in the California proceeding a notice of motion to abate proceeding. (R. 13.) The motion was based on the affidavit of Malcolm Davis, to which was attached a copy of the complaint in the Oregon proceeding. This complaint alleged, as claimed grounds for injunctive relief, hardship upon the petitioner and interference with the war effort in that proper presentation of a defense in California would require petitioner to transport a number of its Oregon employees to California. The complaint does not claim

that the evidence of petitioner's witnesses could not be presented in deposition form under the laws of the State of California but claims only that "usually such explanations cannot be made adequately or understandably by witnesses testifying by deposition only." (R. 20.) Petitioner's motion to abate was denied November 20, 1942. On December 7, 1942 petitioner filed a notice of motion to continue trial. (R. 42.) The case had been set for December 11, 1942 for trial and on the hearing of the motion was continued for trial from December 11, 1942 to December 21, 1942. (R. 67.) On December 14, 1942 petitioner filed an amended answer. On December 21, 1942 at the opening of the trial, petitioner renewed its motion for an indefinite continuance and the motion was denied. (R. 67.) The trial resulted in a verdict and judgment in favor of respondent in the amount of $30,000.00.

It is conceded that the California Courts assume jurisdiction of a tort action in which the accident occurred and the parties reside in other states.

Loranger v. Nadeau, 215 Cal. 362;

Rubin v. Schupp, 127 Fed. 2d 625, C.C.A. 9.

The cases cited by petitioner on page 9 of its brief concern themselves with motions for change of venue from the California Superior Court of one County to the Superior Court in another County on the ground of convenience of witnesses under California Code of Civil Procedure 397, subdivision 3. They have nothing to do with the issue at bar. Therefore, under California law if the cause of action here in question arose under Oregon state law rather than under the Federal

Employers' Liability Act, the California Superior Court would have assumed jurisdiction. It is conceded that the Superior Court is a Court of general jurisdiction adequate to entertain actions under the Federal Employers' Liability Act, and that no question of State Court venue is here involved.

The Supreme Court of the State of California held "The Court (the trial Court) denied defendant's motions without opinion and it must be assumed that the denial was on the merits." (R. 72.) The dissenting opinion starts out with the following statement: "I cannot agree with the assumption made by Mr. Justice Carter that the motions of the railroad company to continue the trial of the two actions were denied upon the merits." (R. 86.) The opinion of the Court therefore, determined that petitioner's motions were denied *on the merits.*

There is nothing in the Federal Employers' Liability Act which compels the California Court to abate a proceeding under the Federal Employers' Liability Act because the accident occurred and the parties reside in another state. It is conceded that petitioner does business in California and that its lines of railroad run through California, and California's jurisdiction is therefore sufficient under *Denver & Rio Grande W. RR. Co. v. Terte,* 284 U.S. 284.

This Court has held that a cause of action must not be discriminated against because it is a Federal one. In the absence of an otherwise valid excuse a State Court of competent jurisdiction must entertain an action under the Federal Employers' Liability Act.

McKnett v. St. Louis & SF. R. Co., 292 U.S. 230.

This rule was restated in the case of *Herb v. Pitcairn*, February 5, 1945, 89 L. Ed. Adv. Op., page 481, at page 485. Since the California Court will entertain jurisdiction of a foreign state tort, there is no reason for it to refuse jurisdiction of a foreign Federal tort. Since the California Supreme Court has held that the motions of petitioner were denied on the merits, there is no Federal question here presented.

It was not incumbent upon the California Courts to grant petitioner's motions merely because petitioner claimed an interference with the war effort. During Federal control of railroads in the last World War, the Director General of such railroads as were under Federal control, ordered that all suits against carriers while under Federal control must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action or in the County or District where the cause of action arose. (See *Alabama & Vicksburg R. Co. v. Journey*, 257 U.S. 111.) No such order has been made during this war and the Union Pacific was not and is not now under Federal control. The California Supreme Court has held that the exigencies of the war effort absent any legislative or executive fiat do not require it to abate the further prosecution of litigation based upon the Federal Employers' Liability Act where it is conceded that petitioner does business and operates a portion of its railroad system in California. No reason appears why the decision of this Court in *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698 following *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 and the *McKnett* case should not be followed.

The Federal Employers' Liability Act, as a "law of the United States" made in pursuance of the Constitution is the "supreme law of the land" (Constitution, Article VI), i.e., it is a part of the substantive law of each state of the Union of States. In enforcing the law in a State Court, it is State judicial power, not Federal judicial power, that is exerted. There is a clear distinction between the opening and the closing of State Courts to plaintiffs seeking enforcement of a Federal substantive right. If California had closed her Courts to such a plaintiff for the duration of the war there would be a question for the Federal Supreme Court, but at bar the California Courts have in substance simply ruled that the State Courts will be kept open for the enforcement of the substantive law of the land made by the Congress in pursuance of the Constitution.

No Federal right, substantial or otherwise, was denied to petitioner. No question of substance not therefore determined by this Court was involved and the decision of the California Court is strictly in accord with applicable decisions of this Court. It is respectfully submitted that the petition for certiorari is entirely devoid of merit and should be denied.

Dated, San Francisco, California,
May 14, 1945.

GEORGE M. NAUS,
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CLIFTON HILDEBRAND,
LOUIS H. BROWNSTONE,
Of Counsel.